UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of:

SHAMROCK FOODS COMPANY

and

THE BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO/CLC

Case No. 28-CA-150157

RESPONDENT SHAMROCK FOODS COMPANY'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

The ALJ's[1] opinion in this case is based more on the sheer bulk of the General Counsel's (the "GC") allegations and its dramatic hyperbole than on the law or relevant facts. The GC and the Union[2] claim that Respondent Shamrock Foods Company ("Shamrock") conducted a massive campaign of purported discipline, threats, interrogation and surveillance to discourage its employees from unionizing. Yet, out of hundreds of Shamrock employees, the GC produced only ***three (3)*** non-supervisory witnesses to testify concerning this allegedly widespread campaign.

Moreover, General Counsel's evidence consisted more of mischaracterization than fact. Thomas Wallace—a purportedly "visible union supporter" that the GC alleges was unlawfully discharged to serve as an example—testified that he had no reason to believe Shamrock was even aware of his alleged union activities. One of the GC's surveillance allegations is based on a brief conversation in which a supervisor asked two employees who were conversing on the warehouse floor if they were on break. The GC claims that Shamrock unlawfully solicited employee grievances despite the company's extensive and undisputed history of soliciting employee feedback.

The ALJ accepted a number of these exaggerations and erroneously found that Shamrock violated Sections 8(a)(1) and 8(a)(3) of the Act.[3] His findings, however, collapse under scrutiny. The ALJ's recommended decision and order therefore should be rejected, and the Complaint should be dismissed in its entirety.

II. BACKGROUND FACTS

Shamrock is a wholesale foods distributer with a number of distribution centers in the western United States. (Hearing Transcript ("Tr.") 138). The largest of these distribution centers is

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1 Administrative Law Judge Jeffrey D. Wedekind will be referred to herein as the "ALJ."

2 The Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, AFL-CIO/CLC is referred to herein as the "Union."

3 29 U.S.C. §§ 158(a)(1) and (3).

in Phoenix, Arizona, and is referred to as the "Arizona Foods" facility. (*Id.* at 138, 140). The Phoenix location includes a warehouse, a meat processing plant, cold storage facilities and administrative offices. (*Id.* at 138-39). Shamrock's corporate offices are located elsewhere in Phoenix, approximately thirty (30) minutes away from the distribution center. (Tr. 428).

Sometime in late 2014 or early 2015, the Union claims to have commenced an organizing campaign at the Arizona Foods facility. The Union, however, has never filed an election petition or otherwise identified the unit of employees it seeks to represent. As the campaign was failing, the Union filed its original unfair labor practice charge against Shamrock on April 15, 2015.[4] (GCX 1(a)). The Union alleged only that Shamrock discharged an unnamed employee for his Union activities and that it maintained unlawful rules in its employee handbook. (*Id.*). Subsequently, the Union's allegations increased dramatically in scope. (GCX 1(e)).

On July 27, Shamrock was served by the General Counsel with a complaint alleging (without merit) an expanded number of violations between January 25 and July 8. (GCX 1(g)). The trial before the ALJ opened on September 8, and continued for seven (7) days. The ALJ issued his recommended decision on February 11, 2016 (the "ALJD") finding violations in regard to slightly more than half of the GC's allegations.

As explained below, the trial evidence demonstrates that these allegations are meritless. Accordingly, they should be dismissed with the other allegations that the ALJ found lacking.

III. THE VARIOUS EMPLOYMENT RULES AND POLICIES THAT THE ALJ FOUND TO BE UNLAWFUL ARE PROPER AND LAWFUL.

Several of the violations erroneously found by the ALJ in this case are based on Shamrock's Employee Handbook, as well as a number of other "rules" that Shamrock allegedly promulgated during the relevant period. (*See* Compl. ¶ 5(b)(1)-(15), 5(c), 5(d), 5(e), 5(r), 5(w)(3), 5(x)). A work

[4] All dates herein are 2015 unless otherwise noted.

rule does not violate Section 8(a)(1) of the Act unless the General Counsel proves that the rule "reasonably tends to chill employees in the exercise of their Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Absent an explicit restriction on Section 7 rights, this burden requires the GC to demonstrate that: "(1) the rule was promulgated in response to union activity; (2) the rule has been applied to restrict the exercise of Section 7 activity; or (3) employees would reasonably construe the language to prohibit Section 7 activity." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646-47.

As the Board has recognized, this analysis cannot be applied in a manner that would "effectively preclude[] a common sense formulation by the [employer] of its rule and obligate[] it to set forth an exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically could apply." *Lafayette Park Hotel*, 326 N.L.R.B. at 826. Thus, "[i]n determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading, it must refrain from reading particular phrases in isolation, and must not presume improper interference." *Lutheran Heritage*, 343 N.L.R.B. at 646. The Board has further cautioned against finding violations "through parsing the language of [a] rule . . . and attributing to the [employer] an intent to interfere with employee rights." *Lafayette Park Hotel*, 326 N.L.R.B. at 825-826.

"Where a rule does not refer to Section 7 activity, [the Board] will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way." *Lutheran Heritage*, 343 N.L.R.B. at 647. Further, the Board should consider the realities of the workplace and the context in which the rules are imposed. *Lafayette Park Hotel*, 326 NLRB at 825-26. These admonitions are particularly relevant in cases where the employer "has not enforced the rule against employees for engaging in such activity, . . . [or] promulgated the rule in response to union or protected concerted activity." *Id.*

The ALJ's findings concerning the alleged work rule violations are contrary to these principles. As an initial matter, the work rules do not explicitly restrict Section 7 activity, and the GC has not presented any evidence that they have been enforced in such a manner. While a failure to show unlawful enforcement is not necessarily fatal in regard to a work rule allegation, the Board "may not cavalierly declare policies to be facially invalid without supporting evidence." *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.*, 253 F.3d 19, 29 (D.C. Cir. 2001).

Here, the GC called a number of employees to testify during trial about their organizing efforts on the Union's behalf. None of these witnesses testified that he believed his organizing activities were prohibited, or even affected, by the challenged work rules. The GC's claim that a reasonable employee would read these rules to restrict Section 7 activity rings hollow given the absence of such testimony.

Even setting aside this omission, however, the General Counsel's work rule allegations should have been dismissed for multiple reasons. These flaws are explained below.[5]

A. The Violations That The ALJ Found In Regard To The Shamrock Associate Handbook Are Based On Unreasonable Readings Of Isolated Terms.

1. The Policy Protecting the Company's Confidential Information And Requiring Non-Disclosure (Exception Nos. 155, 156).

The ALJ erred in holding that Shamrock's handbook provision concerning confidential information is unlawful. (ALJD at 46-47). While the GC's Complaint selectively quoted from a small portion of this policy, the policy in its entirety reads as follows:

> The Company's confidential information is a valuable asset and includes: information, knowledge, or data concerning costs, commission reports or payments, purchasing, profits, markets, sales, discounts, margins, customer histories or preferences, relationships

[5] In addition to its claim that the various work rules alleged in the Complaint are impermissibly overbroad, the GC asserts various cumulative theories that the contested rules also "threatened" employees, solicited employees to report on the concerted activities of their co-workers, and suggested that employees' concerted activities were under surveillance. (*See, e,.g.*, Compl. ¶¶ 5(c) through (e), 5(x)(2), 5(x)(3)). However, because each of the work rules challenged by the GC is lawful and because the GC has introduced no evidence to show that any of these rules have been enforced in an unlawful manner, these cumulative allegations fail as well.

> with vendors, organization structures, associates, customers, surveys, customer lists, lists of prospective customers, customer account records, marketing plans or efforts, sales records, training and service materials, Company manuals and policies, computer programs, software and disks, order guides, financial statements and projections, business plans, budgets, supplier lists, contracts, calendars and/or day-timers that contain customer contact and other customer information, compensation schedules, proposals and quotes for business, notes regarding customers and prospective customers and pricing information.
>
> This information is the property of the Company and may be protected by patent, trademark, copyright and trade secret laws. All confidential information must be used for Company business purposes only. Every associate, agent and contractor must safeguard it. THIS RESPONSIBILITY INCLUDES NOT DISCLOSING THE COMPANY CONFIDENTIAL INFORMATION, INCLUDING INFORMATION REGARDING THE COMPANY'S PRODUCTS OR BUSINESS, OVER THE INTERNET, INCLUDING THROUGH SOCIAL MEDIA. This responsibility includes the safeguarding, securing and proper disposal of confidential information in accordance with the Company's Record Management Policy. This obligation extends to confidential information of third parties that the Company has rightfully received under Non-Disclosure Agreements. You are also responsible for properly labeling any and all documentation shared with or correspondence sent to the Company's attorneys as "Attorney-Client Privileged."

(General Counsel Exhibit ("GCX") 3 at 8-9). The handbook further provides that employees should not disclose such confidential information:

> When you joined the Company, you signed an agreement to protect and hold confidential the Company's proprietary information. This agreement remains in effect for as long as you work for the Company and after you leave the Company. Under this agreement, you may not disclose the Company's confidential information to anyone or use it to benefit anyone other than the Company without the prior written consent of an authorized Company officer.

(GCX 3 at 9).

This definition of confidential information is not unlawful. "[B]usinesses have a substantial and legitimate interest in maintaining the confidentiality of private . . . and proprietary information." *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998). Moreover, in determining whether employees may

reasonably read the policy to interfere with Section 7 rights, the policy must be read as a whole. *E.g.*, *Lutheran Heritage Village-Livonia*. 343 NLRB at 646.

The ALJ's finding of a violation in regard to this rule was based on the reference to employee information. (ALJD at 47). But, reading the policy in its entirety, a reasonable employee would likely interpret the phrase "associates" to mean private, personally identifiable information about associates such as social security numbers, banking information for direct deposit, and similar items. Such a definition is not unlawful.

This reading is consistent with relevant case law. For example, in *Community Hospitals of Central California v. NLRB*, the disputed confidentiality rule prohibited employees from the "release or disclosure of confidential information concerning patients or employees." *See* 335 F.3d 1079, 1088 (D.C. Cir. 2003). Focusing solely on the reference to "employees," the Board held that the policy unlawfully discouraged employees from "revealing information, such as wages or a disciplinary record, concerning [themselves]." *Id.* at 1089. The D.C. Circuit rejected this finding. Instead, recognizing that "confidential information is information that has been communicated or acquired in confidence," the Court found that a "reasonable employee would ***not*** believe that a prohibition upon disclosing information, acquired in confidence, concerning patients or employees would prevent him from saying anything about himself or his own employment." *Id.* (emphasis added). The Court went on to hold that, "to the extent an employee is privy to confidential information about another employee . . . he has no right to disclose that information contrary to the policy of his employer." *Id.*

In a similar case, the Board upheld the employer's "Proprietary Information" rule which contained several specific examples, including "customer and employee information." *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 279 (2003). The Board found that while the phrase in question was "not specifically defined in the rule, it appears within the larger provision prohibiting disclosure

of proprietary information, including information assets and intellectual property and is listed as an example of intellectual property. Other examples include business plans, marketing plans, trade secrets, financial information, patents, and copyrights." *Id.* at 278. Based on this context, the Board concluded that "employees, reading the rule as a whole, would reasonably understand that it was designed to protect the confidentiality of Respondent's proprietary business information rather than to prohibit discussion of wages." *Id.*; *see also Echostar Technologies*, *LLC*, 2012 WL 4321039 at *19, 21 (2012) (ALJ opinion) (confidentiality provision including "employee information" was not unlawful).

Here, Shamrock's confidentiality policy identifies 33 examples of confidential information. These examples focus on the Company's proprietary information, internal business strategies, confidential information, and customer and supplier information. Reading the provision as whole rather than as isolated phrases, employees would reasonably understand that it was designed to protect the confidentiality of Shamrock's proprietary business information. Contrary to *Lutheran Heritage Village-Livonia*, the GC's claim of a violation improperly focuses on a few references in isolation and "presume[s] improper interference with employee rights." 343 NLRB at 647.

2. <u>The "Blogging" Policy (Exception Nos. 157, 160)</u>.

The ALJ also erred in finding that several provisions of Shamrock's "Blogging" policy are unlawful. As an initial matter, Paragraph 5 of the policy explicitly assures employees that "Shamrock respects associates' right to express personal opinions in personal blogs and does not retaliate or discriminate against associates who use their blogs for political, organizing, or other lawful purposes." (GCX 3 at 61-62). Because work rules must be read in their entirety in determining whether they are lawful, *Lutheran Heritage Village-Livonia*. 343 NLRB at 646, Shamrock's "Blogging" policy cannot reasonably be read to restrict Section 7 activity in light of this provision.

The ALJ's decision is erroneous even aside from the assurances in Paragraph 5, however, in light of the fact that these provisions cannot reasonably be read to restrict Section 7 activity. For

example, Paragraph 2 of the policy requires associates to protect their co-workers' home addresses, social security numbers, birth date, driver's license number, and other personal information and the confidentiality of Shamrock trade secrets, marketing lists, customer account information, strategic business plans, competitor intelligence, financial information, business contracts, and other proprietary and nonpublic company information that associates can access." Like Shamrock's policy concerning confidential information discussed above, the examples of protected information listed in this rule preclude it from being read to infringe upon Section 7 rights. See *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003); *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 279 (2003).

Paragraph 3 is similarly lawful. This rule only prohibits associates from using blogs to "harass, threaten, libel, or slander, malign, defame or disparage, or discriminate" against others. (GCX 3 at 61). Courts have refused to enforce Board decisions that find violations based upon such prohibitions. For instance, in *Adtranz ABB Daimler-Benz Transp. v. NLRB*, the Board found a violation based on a work rule prohibiting "abusive or threatening language," harassment and other conduct that conflicted with the company's desire to maintain a "civil and decent workplace." 253 F.3d 19, 25 (D.C. Cir. 2001). In a sharp and extended rebuke, the D.C. Circuit refused enforcement of the Board's decision, holding that the NLRB's position "is not reasonably defensible. It is not even close." *Id.* at 26. The court went on to call the Board's decision "preposterous" and found that it failed to appreciate an employer's obligation to prevent and address workplace harassment:

> We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here. Under both federal and state law, employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment. Abusive language can constitute verbal harassment triggering liability under state or federal law.

Id. at 27-28. Like the Board in *Palms Hotel and Casino*, *supra*, the court in *Adtranz* specifically rejected the notion that it is "unfair to expect union members to comport themselves with general notions of civility and decorum when discussing union matters or exercising other statutory rights." *Id.* at 26.

The remainder of the "Blogging" policy similarly cannot be read to reach Section 7 activity. Shamrock has a legitimate interest in insuring that employee Internet postings, messages and other materials do not inaccurately convey the impression that they were transmitted on Shamrock's behalf or with Shamrock's approval. The challenged policies, which include limitations on the use of Shamrock's logo and links to Shamrock's website are properly tailored to these interests. As a result, they should be deemed lawful.

3. <u>The Policy Concerning Reporting Violations (Exception No. 158)</u>.

The ALJ held that this policy was unlawful only because it pertains to reporting violations of the "Blogging" Policy. (ALJD at p. 55: 35-41). Because the ALJ erred in holding that "Blogging" Policy is unlawful, his finding of a violation based on the policy requiring employees to report violations is erroneous as well.

Even aside from the "Blogging" policy, however, the ALJ's holding is erroneous. The rule reads, in relevant part:

> Shamrock requests and urges associates to use official company communications to report violations of Shamrock's blogging rules and guidelines, customers' or associates' complaints aboutblog content, or perceived misconduct or possible unlawful activity related to blogging, including security breaches, misappropriation or theft of proprietary business information, and trademark infringement. Associates can report actual or perceived violations to supervisors, other managers, or to Human Resources.

(GCX 3 at 62). These provisions do not ***require*** employees to report violations. Rather, ***if*** an associate decides to report a violation, the rule simply "requests and urges [him/her] to use official company communications" for this purpose. The ALJ's holding ignores this lawful reading of the provision, and therefore should be rejected. *See Lutheran Heritage*, 343 N.L.R.B. at 647 ("Where a

rule does not refer to Section 7 activity, [the Board] will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.")

4. <u>The Guidelines To Appropriate Conduct (Exception No. 159, 160)</u>.

The ALJ erred in holding that paragraph 6, under Shamrock's "Guidelines to Appropriate Conduct," is a violation of Section 8(a)(1). (ALJD at p. 56 lines 20-28, 37-42; p. 57 lines 1-5). The rule in relevant part reads:

> Any act that interferes with another associate's right to be free from harassment or prevents an associate's enjoyment of work, including sexual or any other harassment, wasting the associate's time, harming or placing the associate in harm's way, immoral or indecent conduct or conduct that creates a disturbance in the workplace.

(GCX 3 at 64). The ALJ's findings are unsupportable. Again, as an initial matter, the final sentence of the policy explicitly assures employees that "Shamrock will not apply it in a manner that interferes with associates' rights under Section 7 of the National Labor Relations Act. Because work rules must be read in their entirety in determining whether they are lawful, *Lutheran Heritage Village-Livonia*. 343 NLRB at 646, Shamrock's "Guidelines to Appropriate Conduct" policy cannot reasonably be read to restrict Section 7 activity in light of this provision.

Again, however, the ALJ's decision is erroneous notwithstanding these assurances made by Shamrock, however. Employers have a legitimate interest in establishing and maintaining a civil and decent workplace. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647. Indeed, the General Counsel recently issued a memorandum approving of virtually identical "civility" rules, which included prohibitions against threatening, intimidating, coercing, or otherwise interfering with the job performance of coworkers. *General Counsel Memorandum* 15-04, "Report of the General Counsel Concerning Work Rules," March 18, 2015, at *11-12. The General Counsel "publish[ed] this report to offer guidance on [its] views of this evolving area of labor law," expressing hope that employers would conform their policies to the examples identified as lawful. *Id.*

Even aside from the General Counsel's memorandum, the Board has routinely recognized that rules designed to maintain order and avoid liability for workplace harassment are not unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647. In *Palms Hotel and Casino*, for example, the Board upheld a policy restricting employees from engaging in "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons" as lawful. 344 NLRB 1363, 1368 (2005). The Board held that these terms were not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace." *Id.* As noted above, appellate courts have similarly recognized this proposition. *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001) (rejecting the notion that it is "unfair to expect union members to comport themselves with general notions of civility and decorum when discussing union matters or exercising other statutory rights." *Id.* at 26.

Shamrock's prohibition on injurious conduct in the workplace is consistent with these principles. The policy is crafted to maintain order and prevent harassment. The terms of the policy are such that a reasonable employee would understand the types of conduct that are prohibited, and would not confuse them with an attempt to restrict Section 7 rights. The ALJ's ruling should be overturned.

5. <u>The Solicitation And Distribution Policy (Exception No. 161)</u>.

The ALJ also erred in holding the first paragraph of Shamrock's No Solicitation and No Distribution policy was unlawful. (ALJD 57:39-43). The provision, in relevant part states:

> Shamrock believes that the work time of our associates should be devoted to their work-related activities, and that it is neither safe nor productive for our associates to be distracted by individuals engaged in non-work related activities during work time or in work areas. Thus, the conducting of non-company business related activities is prohibited during the working time by either the associate doing the soliciting or the associate being solicited or at any time in customer or

> public areas. Associates may not solicit other associates under any circumstances for any non-company related activities.

(GCX 3 at 65).

The ALJ ruled that this paragraph was unlawful solely on the basis of the references to "customer or public" areas. This policy, however, covers multiple facilities. There was no showing by the General Counsel that any such "customer or public" areas exist at the Phoenix facility. Accordingly, this allegation should be dismissed.

B. The Severance Agreement Offered To Thomas Wallace Was Not An Unlawful Work Rule (Exception Nos. 120, 143-146).

In addition to the handbook allegations, the ALJ erred in finding that Shamrock violated the Act by "promulgating a work rule" in a severance agreement to former employee Thomas Wallace following his discharge. (ALJD p. 43 lines 28-32, 43-46). The General Counsel affirmed during trial that this allegation is based solely only on the theory of an overly broad work rule:

> Q. (*By the ALJ*) Is it your position that this is a rule?
>
> A. (*By Counsel for the GC*) Our position's that this is a rule.
>
> Q. Is it based just on this or is it based on --
>
> A. It is based on this.

(Tr. 688-89). Consistent with the General Counsel's statements at trial, the Complaint alleges only a work rule violation under Section 8(a)(1). (Compl. ¶ 5(r)). The severance agreement is not alleged to violate the Act in any other respect.

As explained above, in contesting a work rule, the General Counsel must establish that a reasonable employee would construe the language to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004). The severance agreement offered to Wallace falls far short of meeting this standard. As Wallace himself acknowledged, the severance agreement was never binding because he refused to sign it:

Q. (*By Counsel for Shamrock*) Mr. Wallace . . . you understood if you signed the [severance agreement] you'd get the money?

A. (*By Mr. Wallace*) Right. Uh-huh.

Q. Okay. And if you signed the agreement you'd be bound by the agreement?

A. If I signed – yes. If I signed –

. . . .

Q. But you didn't sign the [severance agreement] to agree to it?

A. No, sir.

Q. And so you didn't get the money –

A. No, sir.

Q. -- and you're not bound by the agreement?

A. No.

Q. No. Okay. And you had 21 days to consider it, right?

A. Right.

Q. And then it was off the table?

A. Yeah, that was the writing in the back page.

(Tr. 689-90). In short, the severance agreement did not restrict Wallace in ***any*** way, in regard to his Section 7 rights or otherwise. The General Counsel's allegation concerning the severance agreement therefore must fail.

The ALJ's contrary holding was based on *Metro Networks*, 336 NLRB 63 (2001). *Metro Networks*, however, did not involve an alleged work rule violation under Section 8(a)(1). Rather, the employer in *Metro Networks* offered a severance agreement to an employee that included provisions prohibiting him from cooperating in NLRB investigations. In response to the General Counsel's allegation that the severance agreement was unlawful under Section 8(a)(4), the employer argued that there could be no violation because the employee did not sign the agreement. The Board rejected

this argument on the basis that the employer's attempt to interfere with the Board's investigatory process violated Section 8(a)(4) on its own. *Id.* at 67 n. 20. The employee's actions were irrelevant.

Here, the General Counsel has alleged only that Wallace's severance agreement is an unlawful work rule under Section 8(a)(1). Unlike the Section 8(a)(4) violation at issue in *Metro Networks*, this allegation depends almost ***entirely*** upon the "reasonable employee" standard, *i.e.*, whether a reasonable employee would construe the language to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004). And, a reasonable employee would not view himself or herself bound by an agreement that was not signed. Wallace's testimony quoted above confirms his understanding in this regard. The General Counsel's allegation concerning Wallace's severance agreement therefore should be dismissed. The ALJ's contrary holding was in error.

In any event, even if Wallace had signed the severance agreement, the General Counsel's claim still would fail because the challenged provisions are not unlawful. Paragraphs 10 and 12, which the ALJ found to be unlawfully overbroad in defining confidential information, are lawful for the reasons explained in Section III.A.1, *supra*.[6] The ALJ's finding that Paragraph 13's non-disparagement provision might be read to restrict union activity ignores the fact that Wallace was no longer an employee at the time that the severance agreement was presented to him. Moreover, because the provision does not reference Section 7 activity, a violation cannot be found simply because the provision *could* be interpreted to restrict protected conduct. *Lutheran Heritage*, 343 N.L.R.B. at 647. Thus, in addition to ignoring the fact that Wallace did not sign the severance agreement, the ALJ's finding of a violation was erroneous on this basis as well.

[6] The provisions that the ALJ found unlawful are quoted on page 43 of the ALJ's decision.

C. The ALJ's Finding Of An Unlawful Work Rule Based On Engdahl And Vaivao's May 5 Meeting With Lerma Ignores Critical Testimony (Exception Nos. 74-86).

The ALJ found another purported work rule violation based on a May 5, 2015 conversation between Mark Engdahl, Shamrock's Vice President of Operations, and Mario Lerma, a Shamrock forklift driver. (ALJD at 25:15-29:10). Engdahl received reports that Lerma and other forklift operators were either refusing to deliver or delaying delivery of items ("drops") to order selectors who did not sign Union authorization cards (in addition to engaging in other forms of harassment). (Tr. 238:16-240:2, 743:5-12, 746:11-748:16). Engdahl held the meeting to advise Lerma that such conduct was not appropriate, before the situation escalated to the point of discipline. (*Id.*) Notably, Lerma understood what Engdahl was referencing without asking for details, and did not deny that drops were being delayed. (*See* GCX 13(a)).

In holding that this meeting involved the promulgation of an unlawful work rule, the ALJ completely ignored the issue of the delivery slowdowns, which were Engdahl's primary concern in the meeting because of the possible impact on customers. (Tr. 746:19-747:9; 748:5-11). To the extent that the May 5 meeting constituted "promulgation of a work rule," that rule was intended to prohibit such conduct. Indeed, Engdahl specifically testified that he did not consider Lerma's badgering of other employees to be "harassment." (Tr. 746:11-20). Yet, the ALJ did not even mention the delivery slowdowns in his discussion of this allegation. (ALJD at 25:15-29:10). Because such conduct is not protected activity under Section 7, a reasonable employee would not interpret a directive to refrain from such activity as interfering with Section 7 rights. The General Counsel's attempt to establish a work rule violation based on this conversation must fail. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

D. Kent McClelland's May 8 Letter Was A Lawful Prohibition Against Threatening Conduct (Exception Nos. 87-96).

The ALJ erred in finding that Shamrock promulgated an overbroad work rule in a letter sent on May 8, 2015 from Kent McClelland, Shamrock's President and Chief Executive Officer. (ALJD p. 30:5-16). The May 8 letter was sent after McClelland learned that a number of employees reported that they had been threatened at work. (Tr. 354:7-12). While not aware of the specifics concerning the threats, McClelland felt that it was imperative to remind employees that "unlawful bullying" and "threatening, violent, or unlawfully coercive behavior" would not be tolerated. (G.C. Ex. 14). McClelland suggested in the letter that any employee who felt threatened should report the situation. (*Id.*)

As noted in Section III.A.5 above, the General Counsel's recent memorandum concerning permissible employment policies approved of virtually identical prohibitions against threatening, intimidating, coercing, and otherwise interfering with the job performance of coworkers. *General Counsel Memorandum* 15-04, "Report of the General Counsel Concerning Work Rules," March 18, 2015, at *11-12. Moreover, consistent with the admonishments of the court in *Adtranz ABB Daimler-Benz Transp. v. NLRB*, a review of such rules must be undertaken with an appreciation for the fact that "employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment." 253 F.3d 19, 27-28 (D.C. Cir. 2001).

Like the rule at issue in *Adtranz*, the May 8 letter from Kent McClelland in this case was intended to prevent workplace harassment. Moreover, the letter was specifically limited to "unlawful bullying" and "threatening, violent, or unlawfully coercive behavior." This prohibition would not be reasonably understood to prohibit or prevent legally protected union solicitation. As the court observed in *Adtranz*, "America's working men and women are . . . capable of discussing

labor matters in intelligent and generally acceptable language." 253 F.3d at 26. Thus, the ALJ's decisions should be overturned.[7]

IV. THE GENERAL COUNSEL'S ALLEGATIONS OF UNLAWFUL CONDUCT ARE UNSUPPORTED AND BASED ON MISCHARACTERIZATION.

A. The Allegations Concerning Floor Captain Art Manning Should Be Dismissed On Multiple Grounds.

1. The General Counsel Failed To Establish Manning's Supervisory Status (Exception Nos. 5, 44-47).

The ALJ incorrectly held that Shamrock floor captains Art Manning and Zack White[8] were supervisors under Section 2(11) of the Act. Supervisory status is construed narrowly because "the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." *Chevron Shipping* Co., 317 NLRB 379, 380-81 (1995). Section 2(11) thus limits supervisory status to individuals with meaningful authority involving the use of independent judgment:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C § 152(11). Accordingly, only employees with "genuine management prerogatives" may be deemed supervisors, as opposed to "straw bosses, leadmen…and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985), *enf'd. in relevant part*, 794 F.2d 527 (9th Cir. 1986).

The party asserting that an individual is a supervisor must establish two elements with substantive, non-conclusory evidence:

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[7] The ALJ further held that McClelland's May 8th letter was an unlawful threat and that it asked employees to report on the concerted activities of their coworkers. (ALJD at 31:14-20). Because the May 8th letter was a permissible effort to maintain a safe working environment as discussed above, these claims fail as well.

[8] The ALJ recommended dismissal of the Section 8(a)(1) allegation concerning White. (ALJD 18:7-19:30).

(i) That the employee "actually possesses" one of the twelve (12) listed powers, ***and***

(ii) That the exercise of this authority "requires the use of independent judgment" and "is not of a merely routine or clerical nature."

NLRB v. Health Care & Ret. Corp. of America, 511 U.S. 571, 573-74 (1994); *Golden Crest Healthcare Center,* 348 NLRB 727, 731 (2006); *Dean* & *DeLuca of New York, Inc.,* 338 NLRB 1046, 1047 (2003). The independent judgment prong of this analysis requires "concrete evidence showing how assignment decisions are made. The assignment of tasks in accordance with an Employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition." *Franklin Hospital Medical Center,* 337 NLRB 826, 830 (2002). Any absence of such evidence is construed against supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 535 fn. 8 (1999); *Phelps Community Medical Center*, 295 N.L.R.B. 486, 490 (1989).

Here, as the ALJ recognized, the General Counsel failed to present any direct evidence concerning the floor captains' authority. (ALJD at 17, n. 29). Nonetheless, he found supervisory status essentially as a punitive sanction for what he viewed as Shamrock's non-compliance with a subpoena *duces tecum*.[9] Specifically, the ALJ prohibited Shamrock from introducing any document

[9] Two weeks before the trial in this case commenced, the General Counsel served Shamrock with a subpoena *duces tecum* requesting 66 different categories of documents. (GCX 2(a)). Shamrock filed a motion to quash the subpoena on a number of grounds. (*Id.*) The Administrative Law Judge denied Shamrock's motion. (*Id.*) After Shamrock was unable to collect, review and produce all responsive documents by the first day of trial, the General Counsel was awarded sanctions prohibiting Shamrock from introducing any document not produced and from conducting cross or direct examination concerning the duties performed by White and Manning. (Tr. 109:1-23, 123:10-11). The sanctions were later expanded to prohibit Shamrock from conducting cross or direct examination concerning the General Counsel's claim that Shamrock granted an allegedly unlawful wage increase in late May of 2015, after the GC realized that it had excluded this issue from its original sanctions request. (Tr. 911:20-925:25). For the reasons explained in Shamrock's motion to quash and its Request for Special Permission to Appeal which was filed and served in this case on September 11, 2015, Shamrock respectfully renews its objections to the subpoena *duces tecum*. In addition, Shamrock respectfully reasserts its objection that the sanctions awarded to the General Counsel were overbroad in light of the breadth of the subpoena, Shamrock's production of more than 3,000 pages of documents and other issues that Shamrock raised during and before trial. (*See*, *e.g.*, Tr. 113:12-25-115:16, 116:18-117:22.) Finally, Shamrock respectfully submits that enforcement of the subpoena *duces tecum*, in light of the General Counsel's position that it cannot be required to produce documents, creates a process that is one-sided and unbalanced to an extent that constitutes a denial of due process.

not produced and from conducting cross or direct examination concerning the duties performed by White and Manning.[10] (Tr. 109:1-23, 123:10-11). When the General Counsel ***still*** was unable to establish that White and Manning were supervisors, the ALJ granted an adverse inference in support of Section 2(11) status. (ALJD at 18 n.29).

While Shamrock respectfully submits that no sanctions should have been awarded (*see* footnote 10, *supra*), the ALJ's coupling of an adverse inference with his refusal to allow Shamrock to submit ***any*** evidence concerning 2(11) status was particularly inappropriate. An adverse inference requires more than a showing of noncompliance with a subpoena *duces tecum*. The party seeking an adverse inference must establish that responsive documents exist and that they would have been pertinent to the resolution of the case:

> [An] adverse inference is triggered by an adequate showing on the record from which it appears . . . that evidence of relevant (usually), potentially, controlling, vital, or dispositive nature, is in existence; is in the possession, or control, of one party; and has been withheld by that party. When that combination of fact is made to appear clearly enough of record, the basic nature of the adverse inference rule is such that, if such vital or best evidence has not been produced by the party in possession or control of it, fair inference is concluded to lie that it was not produced in resolution of materially joined issue, because it is not favorable to the party possessing it.

Peoples Transp. Service, 276 NLRB 169, 223 (1985); *see also Professional Air Traffic Controllers*, 261 NLRB 922 fn. 2 (1982) ("[W]e do not rely on the negative inference [the ALJ] drew from Respondent's failure to produce certain subpoenaed documents. Inasmuch as the record reflects a substantial degree of confusion concerning the nature, and indeed the very existence, of the documents in question, we cannot, under the circumstances, conclude that such an inference is warranted.")

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[10] Initially, the ALJ advised the parties that he would permit Shamrock to cross-examine the General Counsel's witnesses on the basis for their asserted personal knowledge. Ultimately, however, the ALJ prohibiting questioning even on this issue. (Tr. 825:18-826:8).

Here, there were no responsive documents concerning supervisory status identified in the testimony that were not produced.[11] The General Counsel had ample opportunity to identify such documents, as Manning testified at trial and the GC subpoenaed White but did not call him as a witness. Either individual could have been questioned regarding potentially responsive documents, yet the General Counsel elected to leave the issue unaddressed. The ALJ therefore erred in imposing the compounded penalty of an adverse inference in addition to prohibiting Shamrock from submitting evidence concerning the supervisory issue.

Setting aside the adverse inference, there is no sufficient basis in the record to conclude that Manning and White are statutory supervisors. The GC sought to establish Section 2(11) status based on the testimony of three (3) witnesses—Steve Phipps, Mario Lerma and Thomas Wallace—who never held a floor captain position and who have no personal knowledge regarding the extent of the floor captains' actual authority. Because the General Counsel bears the burden of proof on supervisory status, this showing is inadequate. Indeed, even the ALJ noted that the testimony of these witnesses was "conclusory and lack[ed] supporting detail in some respects, which would normally mean that it fails to satisfy the burden of proof" on the issue of supervisory status. (ALJD at 17, n.29). While the ALJ attempted to cure this deficiency by supplying an adverse inference, his ruling in this respect was erroneous.

Finally, even disregarding the fact that the General Counsel's evidence was facially insufficient, the GC's failure to question White and Manning concerning their authority should have independently resulted in a finding against supervisory status. The ALJ admonished Shamrock for having "real chutzpah" in suggesting that the General Counsel should have examined these

[11] In fact, as Shamrock's counsel explained, the General Counsel received substantial documentation concerning matters such as discipline. (Tr. 116-117; 775:7-23). While the GC complained that these documents were not authored by White or Manning, the fact is that White and Manning authored no such documents because they have no authority to discipline.

individuals concerning their duties.[12] (ALJD at 18, n.28). But, supervisory status depends upon an individual's ***actual*** authority. The extent of that authority may be reflected in documents, but that fact does not mean that such documents are the best (or only) evidence on that point. Accordingly, the GC should not be permitted to ignore witnesses readily at its disposal simply on the basis of unproduced documents. *Cf. Hedison Mfg. Co.*, 249 N.L.R.B. 791, 795 (1980) ("[T]he issue as to whether the central stores department discharges were unlawful does not involve any underlying factual question about the contents of documents or tape recordings, but rather involves the issue of Respondent's motivation for the discharges. . . . Thus, the "best evidence" rule is not applicable.")

In truth, Manning and White are working leads with responsibilities of a routine nature consistently found by the Board to fall short of supervisory status. *See*, *e.g.*, *Croft Metals*, 348 NLRB 717-18 (2006) (lead persons not supervisors though they "direct[ed] the employees as necessary to ensure that the projects are completed on a timely basis"); *Pacific Beach Corp.*, 344 NLRB 1160-61 (2005) (lead person who assigned maintenance tasks to employees and monitored their performance did not exercise sufficient independent judgment to satisfy Section 2(11)'s threshold). Because these individuals are not Section 2(11) supervisors, Shamrock is not liable for their actions. *Clark Mills,* 109 NLRB 666, 670 (1954) ("He is not a supervisor, and his antiunion statements . . . may not be charged as activities for which the Respondent may be held responsible.")

2. Manning's Attendance At The January 28 Meeting Did Not Constitute Unlawful Surveillance (Exception Nos. 55-59).

Even if Manning had been properly determined to be a Section 2(11) supervisor, the AlJ's rulings concerning his conduct were erroneous. The ALJ held that Shamrock conducted unlawful surveillance because Art Manning attended a Union meeting at a local restaurant. (ALJD p. 21:8-

[12] The ALJ based this observation on the notion that "the General Counsel would not have been able to fully cross-examine or impeach them regarding their testimony." (ALJD at 18, n.28). Yet, given the lack of discovery permitted to respondents in Board proceedings, this is often the position that a respondent finds itself in when cross-examining the General Counsel's witnesses. There is no basis for holding the General Counsel to a lighter standard. Moreover, as the party seeking an adverse inference, the General Counsel certainly could have examined Manning and/or White regarding any documents that reflect their duties. It failed to do so.

13). Manning, however, was ***invited*** to attend the meeting. (Tr. 967:19-968:9). Though ignored by the ALJ, this testimony is corroborated by the fact that Joel Rodriguez (a Shamrock hourly employee who attended the meeting) asked Manning if he was "in or out" in regard to the Union campaign. (*Id.* at 969:5-24). Phipps was present and did not deny that he overheard this remark. (*Id.*).

This evidence confirms that Manning did not attend the meeting at the behest of Shamrock. To the contrary, Manning attended the meeting because he was invited and asked if he would be part of the organizing effort. These circumstances preclude any finding of a violation even if Manning was a Section 2(11) supervisor. *E.g.*, *Music Express East, Inc.*, 340 N.L.R.B. 1063, 1076 (2003) ("A supervisor has a right to attend union meetings, as long as he is not directed to do so by the employer, and even to join the union, if admitted to membership.")

B. The ALJ Erred In Finding Violations Based On Purported Threats And Statements Suggesting Futility of Organizing.

The ALJ erroneously found that, during meetings on January 28 and April 29, Shamrock's Vice President of Operations Mark Engdahl suggested that election of a union would be futile and would result in a loss of benefits. But, as explained below, Engdahl simply advised employees that all terms and conditions of employment are subject to negotiation, and that a union cannot force an employer to agree to its demands. These statements parallel the Act's explicit recognition that the "obligation [to bargain] does not compel either party to agree to a proposal or . . . a concession." 29 U.S.C. § 158(d). The ALJ therefore erred in finding violations based on these allegations.

1. Engdahl's "Clean Slate" Statement During The January 28 Town Hall Meeting Was Lawful (Exception Nos. 11-21).

The ALJ held that Vice President of Operations Mark Engdahl unlawfully threatened employees with a loss of benefits in telling them that "the slate is wiped clean . . . once bargaining begins." (ALJD at 5:16-6:14). Such statements, however, are not *per se* unlawful. "An employer can

tell employees that bargaining will begin from 'scratch' or 'zero' but the statements cannot be made in a coercive context or in a manner designed to convey to employees a threat that they will be deprived of existing benefits if they vote for the union." *Somerset Welding & Steel, Inc.,* 314 NLRB 829, 832-33 (1994). Thus, an employer does not violate the Act by "discuss[ing] the reality of negotiating and bargaining, which is that benefits can be both gained and lost." *Id.*

Engdahl's alleged comments are consistent with *Somerset Welding*'s guidance. He advised employees at the beginning of the meeting that they should conduct "[their] own research" and that there was "tons of stuff out there that's pro-union and there's tons of stuff out there that's against unions." (G.C. Ex. 8(a) at 3). He suggested that employees should research these materials and "make [their] own judgments." (*Id.*). Almost immediately after his remark about "the slate is wiped clean," Engdahl told employees "there's no guarantees when you go into collective bargaining that you're going to come out with anything better than you got." (*Id.* at 9). He further advised them that a union "can promise you all kinds of stuff, but they can't guarantee it." (*Id.*). These statements all reflect "the reality of negotiating and bargaining" and cannot be the basis for a Section 8(a)(1) violation. *Somerset Welding*, *supra* at 832-33.

While Engdahl's comments viewed in their totality confirm that he was simply describing the give-and-take of collective bargaining, the flaws in the ALJ's holding become even more apparent in light of statements made by other managers during the relevant time period. Multiple Shamrock supervisors (including, but not limited to, Warehouse Manager Ivan Vaivao) repeatedly told employees that their total compensation and benefits package could be better, worse or the same after going through the collective bargaining process.[13] Shamrock managers furthermore told

[13] Shamrock served a subpoena on the Union seeking production of recordings from meetings other than those that were introduced by the General Counsel. Steve Phipps, the GC's witness, testified that he had additional recordings and that he had turned them over to the Union as a complete collection. (Tr. 590:11-591:25, 593:4-11). This includes a recording made by an individual named Gilbert Jaquez that was not introduced at trial. (Tr. 568:18-23). Shamrock representative Ivan Vaivao further testified that there were "dozens" of meetings with employees to

employees that they had the right to unionize and that they should do their own research concerning the issue. (Tr. 845:24-846:4).

These statements could have been entered into evidence but for the Union's apparent destruction of relevant evidence. Shamrock served a subpoena on the Union seeking production of recordings from meetings other than those that were introduced by the General Counsel. Steve Phipps, the GC's witness, testified that he had additional recordings and that he had turned them over to the Union as a complete collection. (Tr. 590:11-591:25, 593:4-11). These recordings included one made by an individual named Gilbert Jaquez that was not introduced at trial. (Tr. 568:18-23). Moreover, Shamrock representative Ivan Vaivao further testified that there were "dozens" of meetings with employees to educate them concerning unionization (Tr. 902:4-7), and Phipps testified that he recorded "every meeting that [he] attended with management." (Tr. 590:14).

The Union, however, failed to turn over a single recording in response to Shamrock's subpoena, and was unable to explain why these recordings were no longer in its possession. In these circumstances, an adverse inference should have been drawn that those recordings would further corroborate the non-coercive context of Shamrock's discussions with employees concerning the possible results of unionization. Yet, despite granting adverse inferences in the General Counsel's favor, the ALJ declined Shamrock's request based on his unexplained view that the Union's failure to produce evidence was not "contumacious." (ALJD at 6 n. 8). Compounding this error, the ALJ then rejected Shamrock's argument that other meetings would corroborate the lack of coercion on the basis that there was no evidence pertaining to these meetings. (*Id.*) In addition to suggesting

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educate them concerning unionization (Tr. 902:4-7), and Phipps testified that he recorded "every meeting that [he] attended with management." (Tr. 590:14). The Union, however, failed to turn over any recordings in response to Shamrock's subpoena, and was not able to explain whether any such recordings had been destroyed. In these circumstances, Shamrock requests an adverse inference that those recordings would further corroborate the non-coercive context of Shamrock's discussions with employees concerning the possible results of unionization.

improper bias, these facts confirm that the ALJ erred in finding a violation based on Engdahl's January 28 statements.

2. The General Counsel's Futility Allegation Concerning Engdahl's Statements At The April 29 Meeting Is Based On A Misconstruction Of Engdahl's Words (Exception Nos. 39, 42, 43).

The ALJ's finding that Engdahl violated Section 8(a)(1) during the April 29 meeting was erroneous for largely the same reasons that his findings concerning the January 28 meeting should be rejected. The ALJ found a violation on the basis that Engdahl told employees "that the Company does not have to agree to anything through collective bargaining." (ALJD at 12:27-28). Engdahl further noted that the Company would have to "bargain in good faith." (G.C. Ex. 12(a) at 6). Engdahl also noted on multiple occasions that his comments were nothing more than his opinion. (*E.g.*, *id.* at 3-4).

As noted above, Engdahl's statements parallel the Act's recognition that the "obligation [to bargain] does not compel either party to agree to a proposal." 29 U.S.C. § 158(d). And, as expressions of opinion, his comments fall within Section 8(c)'s protections. 29 U.S.C. § 158(c). The ALJ held to the contrary solely on the basis of his mistaken belief that other unfair labor practices occurred. (ALJD at 15:17-24). As explained elsewhere herein, the ALJ's findings concerning other purported violations were erroneous. But, even aside from that fact, the existence of other, purported violations does not cause an employer to forfeit the protections of 8(c) or preclude an explanation of the realities of collective bargaining. This allegation therefore should be dismissed.

3. Engdahl's Statement During That The Union Might "Hurt" The Employees And The Company In The Future Was A Protected Expression Of Opinion (Exception Nos. 39, 41, 43).

The ALJ further erred in finding that Engdahl threatened employees with a loss of benefits by stating his opinion that the Union would "hurt" Shamrock and its employees in the future. (ALJD at 14:28-15:2). As mentioned above, Engdahl stated on multiple occasions that his

comments during the April 29 meeting were only an expression of his opinion. (*E.g.*, G.C. Ex. 12(a) at 3, 4). Again, the ALJ nonetheless found that these comments were unlawful based on his erroneous findings concerning the General Counsel's other allegations. (ALJD at 14:28-15:2). As explained in the preceding section, his reasoning in this regard was flawed and should be rejected.

Moreover, unlike the cases cited by the ALJ, there were no threats of plant closure alleged in this case. *See Reno Hilton*, 319 N.L.R.B. 1154, 1155 (1995) (statement that union would "seriously hurt" employees was unlawful based in part on the fact that the employer's "unlawful acts included threatening an employee that the hotel would close before the Union could come in"); *Homer D. Bronson Co.*, 349 N.L.R.B. 512 (N.L.R.B. 2007) ("The judge found, and we agree, that the Respondent--in campaign speeches and posters--unlawfully threatened employees with plant closure and job loss if they chose union representation.") In the context of plant closure threats, statements that a union will "hurt" employees are substantially more coercive. The cases relied upon by the ALJ therefore are distinguishable.

C. The General Counsel's Interrogation Allegations Are Factually Incorrect And Legally Unsupportable.

The ALJ's findings concerning purported interrogation are similarly incorrect. The Board has recognized that interrogation allegations must be viewed in a manner that is mindful of normal workplace communication:

> In deciding whether questioning in individual cases amounts to the type of coercive interrogation that section 8(a)(1) proscribes, one must remember two general points. Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. Moreover . . . [i]f section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution.

Rossmore House, 269 NLRB 1176, 1177 (1984).

Determining whether a particular question amounts to coercive interrogation must be based on a totality of the circumstances. *Rossmore House*, 269 NLRB at 1178. This determination requires consideration of factors including: "(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation." *Id.* at 1178 n.20; *see also Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). These and other factors are not to be mechanically applied. *Id.* Based on these factors, questions from low-level supervisors during brief conversations are typically deemed to be non-coercive. *See*, *e.g.*, *Toma Metals, Inc.* 342 NLRB 787, 789 (2004); *Hancock*, 337 NLRB 1223, 1224-25 (2002).

1. Jake Myers Did Not Unlawfully Interrogate Wallace On January 28. (Exception Nos. 49-54).

The ALJ's holding that first-level supervisor Jake Myers questioned employee Thomas Wallace in the warehouse about his Union sympathies fail under this framework. (ALJD 20:17-24). Wallace testified that Myers asked him what he "[thought] about the union" after employees were shown a video explaining union authorization cards, and that he told Myers he would "have to do his research. (Tr. 649:14-650:5). Myers, on the other hand, testified that he only asked employees if they had any questions regarding the video. (Tr. 863:9-864:13). The ALJ purported to credit Wallace's version of events over Myers' testimony. (ALJD at 20, n.35).

The ALJ's finding in this regard is based on a misstatement of Myers' testimony. The ALJ credited Wallace's testimony on the basis that, according to the ALJ, Myers "could not recall his conversation with Wallace." (*Id.*) In truth, Myers testified that he ***did*** recall asking the employees if they had any questions, but could not recall if Wallace was one of the employees who voiced concerns. (Tr. 863:21-864:13). The ALJ's acceptance of Wallace's story therefore is not entitled to the deference typically accorded to ALJ credibility determinations, and his finding of a violation should be rejected. *E.g. Starcraft Aerospace*, 346 NLRB 1228, 1231 (2006) (reversing ALJ's credibility determinations based on his "misapprehension of the relevant testimony.")

Even crediting Wallace's testimony, the ALJ's findings still would be in error. Myers is a front-line supervisor. The conversation occurred in the open and was brief in duration. There is no claim that Myers repeated his purported questioning or that he committed any other violations.

Furthermore, while the ALJ noted that Wallace "gave a noncommittal response," (ALJD at 20:23), he again ignored the actual testimony. Wallace testified that he was not even aware of the Union campaign at that point (Tr. 649:14-16), and that he gave Myers an honest response:

> Q: (*Counsel for the General Counsel*) [W]hat did you say [to Myers]?
>
> A: (*Wallace*) I told him honestly, I have to do some research, but I did talk to my dad and my neighbor and the Sysco driver, and they said that the Union has better benefits for employees, and I told him I'd have to do my research first.

(Tr. 650:1-5). In short, Wallace's response was "noncommittal" because he ***was*** noncommittal at that time. This allegation accordingly should be dismissed. *See Toma Metals Inc.* 342 NLRB 787, 789 (2004) (questioning by supervisor was not unlawful interrogation where the communication was by a "low-level supervisor, not a high-ranking manager; the supervisor and employee were friendly and engaged in daily conversations; the conversation occurred on the plant floor not in a boss' office; the employee did not hesitate to answer truthfully; the employee did most of talking; the conversation was brief; the conversation was general and not about specific employees or groups; and was not sustained or repeated.")

2. Joe Remblance's Attempt To Engage In Friendly "Small Talk" With Phipps Was Not A Coercive Interrogation (Exception Nos. 65-70).

The ALJ also held that Shamrock Safety Manager Joe Remblance engaged in unlawful interrogation when he spoke with employee Steve Phipps and another individual who were having a conversation in an aisle way. (ALJD p. 23:25-36). Phipps testified that Remblance simply asked the two employees what they were discussing and whether they were on break. (Tr. 620:2-621:9). Following their responses, Remblance stayed to make "small talk." (*Id.*). Phipps himself testified in

his affidavit that it was not unusual for Remblance to join such discussions. (RX 1 at 43). Remblance then left the area ***before*** Phipps and the other individual finished their conversation. (*Id.*). This entire incident occurred over the course of three to four minutes. (Tr. 621:5-9).

Setting aside the General Counsel's characterizations, this incident amounts to nothing more than an innocuous conversation between a supervisor and two employees who were on break. It was not a coercive interrogation regarding union sympathies, and the ALJ erred in holding otherwise. *See Toma Metals Inc.*, *supra.*

3. Garzon Did Not Interrogate Employees Regarding Their Union Sympathies (Exception Nos. 97-99).

The ALJ held that Sanitation Supervisor Karen Garzon, interrogated employees about their union sympathies. (ALJD at 32:22-23). The evidence does not support this conclusion. Garzon testified that she was sitting in the break room having lunch with two sanitation employees when Phipps approached their table and handed each of them a union flyer. (Tr. 872-874). One of the employees handed Garzon her flyer and asked her to translate it. (Tr. 875-876). When Garzon went to leave, she took the flyers that were handed to her or left on the table. (Tr. 876).

Phipps then approached the group and confronted Garzon, who reached out and offered the flyers back to the two employees. (Tr.626, 876). When the employees failed to reach out and take the flyers, Garzon asked "do you guys want it back" and the employees responded "no." (Tr. 876). Garzon then left the break room with the three flyers, which she subsequently discarded. (*Id.*)

The ALJ's finding that Garzon's offer to return the flyers was unlawful interrogation is, at best, overreaching. Indeed, it is clear that Garzon only asked the two employees if they wanted the flyers back because they each failed to take the flyers when Garzon physically offered to return them. Further, there is no evidence to rebut Garzon's testimony that the employee handed her the flyer for translation. According to Phipps, Garzon was a native Spanish speaker as were the two employees. (Tr. 625-626). Phipps also admitted that he has no knowledge of Garzon's

conversation with the employees or whether any of the employees asked Garzon to translate the flyer. (Tr. 626). While Phipps maintained that the flyer was already translated into Spanish, the alleged flyer was never submitted as evidence by the General Counsel.

Even setting these facts aside, and even assuming that Garzon's interaction with her co-workers constitutes a communication regarding union sympathies, it does not amount to the type of coercive interrogation that violates the Act. As the Board has recognized, treating instances of "casual questioning concerning union sympathies" as a violation of the Act "ignores the realities of the workplace." *Rossmore House*, 269 NLRB 1176, 1177 (1984). Moreover, Garzon is a low level supervisor who was friendly with the other employees involved in the interaction. (Tr. 877). The conversation occurred in a common area, and was brief, general, and not repeated. Further, the conversation did not contain any threat of reprisal or promise of benefit. The evidence therefore does not establish the conversation was unlawful, and the ALJ's finding of a violation should be rejecred. *Toma Metals Inc.* 342 NLRB 787, 789 (2004).

D. The ALJ's Finding That Shamrock Unlawfully Solicited Grievances Ignores Shamrock's Substantial and Undisputed History Of Soliciting Employee Feedback (Exception Nos. 11, 22-36).

The ALJ's finding that Shamrock Human Resources Manager Natalie Wright and Warehouse Manager Ivan Vaivao unlawfully solicited employee grievances on January 28 and February 5 is based on an improperly myopic view of the evidence. (ALJD at 8:7-9:4). Indeed, the General Counsel's own witnesses undermined this allegation. Phipps admitted that Shamrock has conducted "hundreds" of employee roundtable meetings during his 20 years with the Company to solicit employee feedback. (Tr. 575:9-14). In addition to the employee roundtable meetings, Phipps acknowledged that he has taken advantage of Shamrock's open-door policy on multiple occasions to discuss issues with management, and that management representatives (including Wright) have approached him for his feedback. (Tr. 572-84).

An employer is permitted to continue employee feedback meetings during union organizing provided such meetings are consistent with its past practice. *Walmart Inc.*, 339 NLRB 1187, 1187 (2003) (employer may continue to use the same practices of soliciting grievances during a union campaign as it did prior to the start of the union campaign). Phipps' testimony described above unequivocally confirms that Shamrock did nothing more than continue its past practice of conducting employee roundtables.

The ALJ, however, nonetheless found a violation in regard to these allegations. This finding is erroneous in at least two respects. First, the ALJ acknowledged the lack of any "direct evidence that the Company knew" of the Union campaign at that time. (ALJD at 7:31). In fact, as the ALJ further acknowledged, the Union's "campaign was still covert." (*Id.*). The ALJ therefore ***presumed*** that Shamrock "suspected" an organizing campaign at the Phoenix warehouse simply because Engdahl showed a video to employees on January 28 concerning the significance of a union authorization card. (Id. at 7:32-35).

Engdahl, however, specifically told employees that the January 28 meeting was held because of an organizing campaign at Shamrock's Southern California facility. (G.C. Ex. 8(a) at 1). Engdahl's testimony during trial was consistent with his statements during the January 28 meeting. (Tr. 894:1-9). No evidence was presented to contradict this testimony. The ALJ's finding of a violation therefore is based entirely upon his unsupported assumption, and should be rejected.

In addition, though acknowledging that "there [was] no dispute that the Company had a history of holding roundtable meetings with employees," the ALJ found a violation simply because Shamrock reduced the size of the meetings and therefore stated that they would be held more frequently.[14] (ALJD at 7:38-8:5). Contrary to the ALJ's view, this change on its own is not a "significant departure" from past practice. More important, Phipps testified that he had personally

[14] There is no evidence that Shamrock ***actually*** reduced the size of the meetings, or that such meetings were scheduled more frequently. In fact, the General Counsel introduced no evidence concerning prior roundtables.

been involved even in ***one-on-one*** meetings with managers to express his concerns and provide feedback, some of which he instigated and some of which he was asked to attend. (*E.g.*, Tr. 573:7-14; 580:9-19). The ALJ ignored this evidence in his decision. Because this testimony confirms Shamrock's past practice of soliciting feedback in groups as small as a single employee, the ALJ's finding of a violation cannot stand.

E. The ALJ's Holding That Shamrock Unlawfully Promised And Granted Benefits Lacks Any Foundation In The Evidence.

1. Engdahl's April 29 Confirmation That No Layoffs Would Be Conducted Was Consistent With The Company's Longstanding Message And Timed Based On Shamrock's Annual Slow Period (Exception Nos. 11, 39-40).

The ALJ's finding that Shamrock granted a benefit by announcing that it would not conduct layoffs prior to the 2015 summer slowdown is contrary to the evidence. (Tr. 20:9-17). Engdahl testified without contradiction that Shamrock began discussing plans to avoid a 2015 layoff shortly after a layoff in early summer of 2014. (Tr. 737:20-738:17). Engdahl further explained that the 2014 layoff was the most significant that Shamrock experienced in at least 20 years, and caused a great deal of disruption. (Tr. 737:20-738:17; 739:2-9). Shamrock began implementing its plan to avoid a 2015 summer layoff by entering into a hiring freeze in December 2014, well before Shamrock had any knowledge of union organizing at the Arizona Foods facility. (Tr. 757:20-758:9). Moreover, Engdahl testified—again without contradiction—that employees were told that a 2015 layoff would be avoided if at all possible ***immediately*** after the 2014 layoff was conducted, and were kept apprised of the Company's plans throughout the remainder of 2014 and the beginning of 2015. (Tr. 757:5-17). In light of these uncontroverted facts, Engdahl's April 29 statement—made on the cusp of Shamrock's slow season—was not unlawful.

2. The May 2015 Wage Increases Were Unrelated To The Union's Organizing Activity (Exception Nos. 103-117).

The ALJ improperly found that wage increases Shamrock granted to certain employees in late May 2015 were unlawfully intended to discourage them from unionizing. (ALJD at 34:1-35:37). According to GC witness Steve Phipps, these individuals worked in the Returns, Will Call and Sanitation departments, and in one of Shamrock's thrower classifications. (Tr. 559:9-12). Phipps is a forklift operator and does not work in any of these classifications. (Tr. 484:21-23).[15]

To be unlawful, a wage increase must be granted after the employer is aware that the affected employees are presently engaged in organizing activity, and must be specifically in response to that activity. *See*, *e.g.*, *Hampton Inn NY--JFK Airport*, 348 N.L.R.B. 16, 18 (2006) (holding that promise of wage increase during union organizing was not unlawful because employer was not aware that employees at the affected site were involved); *see also Desert Aggregates*, 340 N.L.R.B. 289, 290 (2003) ("An employer's legal duty in deciding whether to grant a benefit during [union organizing] is to act as it would have if the union were not present."). Even where a wage increase is granted to employees who engaged in organizing activity, the increase is not unlawful if the employer reasonably believes that the activity is not ongoing. *See Sigo Corp.*, 146 N.L.R.B. 1484, 1485-6 (1964) (new health plan not unlawful where the employer "assume[d], reasonably, that the Union had lost interest in organizing the employees, or that the organizing campaign was to be held in abeyance.")

The ALJ's finding of a violation in regard to this allegation is based on a misunderstanding of Shamrock's arguments. First, Shamrock explained that, because no election petition was filed, the

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[15] The ALJ's ruling on this allegation is again the result of the overbroad sanctions that he awarded to the General Counsel based on the subpoena *duces tecum* discussed in footnote 9, *supra*. While the wage increase was originally excluded from the ALJ's ruling, he later expanded the sanctions after the GC realized that it had excluded this issue from its original sanctions request. (Tr. 911:20-925:25). Shamrock therefore was prohibited from submission of any evidence concerning this allegation. (*Id.*) The ALJ's finding of a violation in regard to the May 2015 wage increases should be rejected on this basis as well.

company had no knowledge at the time of which employees the Union had targeted in its organizing effort. Indeed, because the Union has never filed an election petition, Shamrock ***still*** has no knowledge of the particular classifications that the Union is seeking to include in its proposed unit. The ALJ characterized this argument as an assertion that a wage increase can ***never*** be unlawful in the absence of an election petition. (ALJD at 35:1-11). This observation misconstrues Shamrock's argument, which is simply that it was not aware these individuals were included in the Union's organizing efforts. The lack of a petition was simply illustrative in this regard.

Second, Shamrock pointed out Phipps' May 21 affidavit testimony that the Union's campaign was essentially dormant by the time of the May increases. (RX 1 at 52-53). As the Board recognized in *Sigo Corp.*, *supra*, an employer does not violate the Act by granting a wage increase at a time when it reasonably believes that union organizing is being "held in abeyance for the time being." 146 N.L.R.B. at 1486. The ALJ rejected this argument on the basis that Shamrock was not in possession of Phipps' affidavit at the time the increases were granted. But, regardless of whether Shamrock was in possession of Phipps' affidavit, his remark that the campaign was dormant is relevant to Shamrock's belief concerning the ongoing nature of campaign activity at that time.

F. The General Counsel's Allegations Of Implied And Actual Surveillance Are Meritless.

1. Joe Remblance's Attempt To Engage In Friendly "Small Talk" With Phipps Was Not Unlawful Surveillance (Exception Nos. 65-70).

In another example of exaggerated mischaracterization, the ALJ held that Shamrock Safety Manager Joe Remblance engaged in unlawful surveillance and interrogation when he approached Phipps and another employee who were having a conversation in an aisle way. (ALJD p. 23 lines 9-33). The General Counsel's sinister description of this event is again belied by its own witness. Phipps testified that Remblance simply asked the two employees what they were discussing and whether they were on break. (Tr. 620:2-621:9). Following the employees' responses, Remblance

stayed to make "small talk." (*Id.*). Phipps himself testified in his affidavit that it was not unusual for Remblance to join such discussions. (RX 1 at 43). Remblance then left the area ***before*** Phipps and the other individual finished their conversation. (*Id.*). Phipps testified that this entire incident occurred over the course of three to four minutes. (Tr. 621:5-9).

Setting aside the General Counsel's characterizations, this incident amounts to nothing more than a supervisor engaging in an innocuous conversation with two employees who were on break. Such conversation does not amount to unlawful surveillance or interrogation regarding union sympathies. Moreover, even if Phipps and the other employee were discussing Union matters, and even if Remblance's conversation with them could somehow be characterized as surveillance, surveillance of Union activities conducted openly on the employer's premises is not unlawful. *See*, *e.g.*, *Airport 2000 Concessions, LLC*, 346 NLRB 958, 958-959 (2006) (supervisor did not conduct unlawful surveillance by observing and interjecting in employee conversations); *Jewish Home for the Elderly of Fairfield Cnty.*, 343 NLRB 1069, 1084 *citing Roadway Package Sys.*, 302 NLRB 961 (1991) ("Where employees are conducting their activities openly on or near the employer's premises, open observation of such activities is not unlawful.")

2. Viewed In Context, Vaivao's Statement That Employees Who Did Not Wish To Be Solicited Should "Raise Their Hand" Was Not An Unlawful Request To Ascertain And Disclose The Union Activities Of Others. (Exception Nos. 11, 37-38).

The ALJ's erred in ruling Viavao's statement to "raise your hand" created an impression of surveillance and was an instruction to report on the union activities of others. But, Vaivao testified without contradiction that there is no manager on the dock that would see an employee raise his hand. (Tr. 905:8-24). This comment therefore could not be understood as an instruction to report on the activities of coworkers.

G. Lerma's Claim That Garcia Searched His Belongings Is Insufficient To Establish Unlawful Surveillance (Exception Nos. 71-73).

The ALJ also found that supervisor Dave Garcia "search[ed] through [employee Mario Lerma's] personal belongings" in May 2015. (Compl. ¶ 5(v)(1)-(3)). The basis of this claim is an allegation by forklift driver Mario Lerma alleging that Garcia looked through a clipboard that Lerma left unattended on his assigned forklift. Lerma's claims regarding Garcia's illegitimate motivations are unsupported.

Garcia provided credible testimony that he saw a work schedule, attached to a generic company-issued clipboard, sitting in plain sight on top of a parked and unattended forklift and picked it up to review the schedule. (Tr. 945-948, 951). It is Garcia's practice to periodically review the schedule throughout the night to assess whether team members need to be shuffled around to work the busiest aisles. (Tr. 946-947). Garcia may shuffle his team around two or three times a night. (Tr. 947).

Garcia denies that he was aware that the clipboard belonged to Lerma when he initially picked it up. (Tr. 947, 951). Lerma's claim that Garcia would have known based on the forklift number lacks credibility. It is without dispute that Garcia had worked with this group of forklift drivers for only seven months and was not involved in the process of assigning forklifts to employees. (Tr. 940). Garcia confirmed that he did not memorize forklift numbers and, as of the hearing, could not state what forklift number Lerma generally used or even which one of the two brands of forklifts Lerma prefers or is generally assigned. (Tr. 943, 958).

Further, forklift drivers are not guaranteed the same forklift for every shift. (Tr. 940). Rather, forklifts are fungible and are reassigned for various reasons, including where an emplioyee from a prior shift is still using a forklift or where a forklift is taken out of rotation for maintenance reasons (Tr. 940-942). As such, it is undisputed that Lerma could have been assgined *any* forklift that day.

Lerma's characterization of the clipboard as being part of his "personal belongings" is also an exaggeration. There were no markings on the clipboard designating it "private" in any way or noting that it belonged to Lerma. (Tr. 949-951). Company issued clipboards are provided to all employees who request them and countless clipboards be found throughout the facility with schedules, or other work-related paperwork attached, and can hardly be construed as "private" when left out in the open. (Tr. 945, 959). Indeed, employees are assigned a locker to put personal belongings and are warned not to leave valuable or personal items on their forklift, as there is no private compartment or space to maintain them. (Tr. 943-944). Both Lerma and Garcia confirmed that anyone who had walked by the forklift could have seen the clipboard, which was out in the open. (Tr. 838). To further support that there was no expectation of privacy in his clipboard, Lerma confirmed that he does not keep other personal belongings on his forklift. (Tr. 838).

Lerma's claim, which Garcia denies, that later in the day Garcia admitted that he had been looking through the clipboard for union cards is similarly not credible. (Tr. 951). Garcia is a seasoned manager and denies having had any conversations with Lerma where he made such a statement. Similarly, Garcia was not aware of any particular distribution of union cards and denies having accused Lerma of distributing a union card to another employee. (Tr. 952, 962). Finally, while Garcia does not recall having any specific conversation with Lerma, Lerma's suggestion that Garcia solicited grievances by reinforcing a long-standing open-door policy would not constitute solicitation of grievances in violation of the Act.

V. GENERAL COUNSEL IS UNABLE TO ESTABLISH THE ELEMENTS NECESSARY TO SUPPORT ITS CLAIMS OF UNLAWFUL DISCIPLINE.

A. Allegations Concerning Unlawful Discipline Are Subject To The *Wright Line* Burden-Shifting Approach.

Finally, the General Counsel claims that Shamrock discharged Thomas Wallace and disciplined Mario Lerma on the basis of their Union activities. These claims are subject to the

burden-shifting approach established in *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel must make an "initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision." *Am. Gardens Mgt. Co.*, 338 N.L.R.B. 644, 645 (2002). This showing requires four elements:

(i) That the employee engaged in protected, concerted activity;

(ii) That the employer knew of the employee's protected, concerted activity;

(iii) That the employee was subject to an adverse employment action; and

(iv) That a motivational link, or nexus, existed between the employee's protected activity and the adverse employment action.

Id. at 1089; *see also Tracker Marine*, 337 N.L.R.B. 644, 646 (2002).

The second and fourth prongs of the *Wright Line* test are both critical. A claim of unlawful discipline must fail if the General Counsel does not establish a link between the employee's protected activities and the relevant adverse employment action. *See Forsyth Electrical Co., Inc.*, 349 N.L.R.B. 635, 638-39 (2007); *see also Meyers Industries*, 268 N.L.R.B. 493, 497 (1984), *remanded on other grounds* 755 F.2d 941 (D.C. Cir. 1985) (*Meyers I*). Indeed, the Board has recognized that an "employer may discharge [an] employee for any reason, whether or not it is just, as long as it is not for protected activity." *Yuker Constr. Co.*, 335 N.L.R.B. 1072, 1073 (2001) *quoting Manimark Corp. v. NLRB*, 7 F.3d 547, 550 (6th Cir. 1993). The General Counsel cannot satisfy this requirement if it does not establish the employer's knowledge of the employee's protected conduct. *Gestamp v. NLRB*, 769 F.3d 254 (4th Cir. 2014).

B. The ALJ's Finding Of A Violation In Regard To Wallace's Discharge Is Unsupported And Unsupportable (Exception Nos. 118-119, 121-142).

1. There Is No Basis For Concluding That Shamrock Had Knowledge Of Wallace's Union Activity.

The ALJ's finding that Wallace's discharge violated Sections 8(a)(1) and (3) of the Act disregards the employer knowledge element of the *Wright Line* test. Wallace was discharged because he stormed out of a March 31 mandatory meeting after being told by Senior Vice President of Human Resources Bob Beake that Shamrock was not going to change its health insurance plan to pick up 100% of the cost. (Tr. 193:5-15). The ALJ, however, held that Wallace was discharged because he asked about the health plans and on the basis of his "Union activity," which consisted of nothing more than signing an authorization card, attending a single meeting, and turning in cards signed by his brother-in-law and father-in-law.

Critically, there is no evidence that Shamrock was aware of Wallace's alleged Union activities. Wallace himself admitted this fact in his trial testimony. (Tr. 695:11-696:2). As explained above, the absence of such evidence precludes a finding of unlawful discharge. *E.g.*, *Gestamp v. NLRB*, 769 F.3d 254 (4th Cir. 2014).

The ALJ accepted the General Counsel's attempt to cure this evidentiary lapse with a cobbled assembly of unrelated events, none of which support a finding that Shamrock knew of Wallace's Union activity. First, the ALJ relied on Engdahl's January 28 meeting, where Wallace asked Engdahl for his opinion on why Shamrock's competitors were unionized. (ALJD at p. 40:3-5). The ALJ based this finding on Engdahl's "admission" that he thought Wallace's question was insightful. (ALJD at p.40, n.70). Nothing about Wallace's question, however, suggested that he supported the Union. In fact, Wallace testified that he was not even aware of the Union's campaign at the time of the January 28 meeting. (Tr. 650:19-23).

Second, the ALJ found that Shamrock had knowledge of Wallace's Union activity based on a statement by Warehouse Manager Vaivao on March 26 that the company knew which employees were soliciting Union authorization cards.[16] (ALJD at p. 40:4-6). Vaivao, however, never mentioned Wallace. Moreover, the ALJ's finding is based entirely on a mischaracterization. The ALJ recounted Vaivao's statement as a declaration that the company knew which employees "supported" the Union. (ALJD at p. 40:4-6). But, in truth, Vaivao said only that Shamrock knew which employees were soliciting Union authorization cards based on employee complaints concerning the organizers' aggressive tactics. (*Id.* at p. 11:9-15).

Third, the ALJ found that Wallace's question during the mandatory March 31 meeting as to whether Shamrock would pick up 100% of his health insurance costs revealed his role in the Union campaign. (ALJD at p. 40: 3-4). There is no basis for this asserted connection. Wallace testified that neither he nor anyone else mentioned anything about the Union during this meeting. (Tr. 695:11-696:2). In addition, a number of employees asked questions pertaining to health insurance during this meeting. (Tr. 675:15-676:7).

In sum, there is no probative evidence to establish Shamrock's knowledge of Wallace's Union activities. Because such knowledge is a required element of the General Counsel's burden to show that Wallace's discharge was unlawful, this claim must be denied.

2. <u>The ALJ's Finding Of Pretext Is Based On Improper And Unsupported Speculation</u>.

In addition to his error on the knowledge element of the *Wright Line* test, the ALJ further erred in concluding that Wallace's discharge was unlawful based on "circumstantial evidence." (ALJD p. 40: 12-16). For example, the ALJ claimed that Shamrock offered "shifting" and "false" reasons for Wallace's discharge. (*Id.* at 40:18-27; 41:1-20). This finding is based on a reference in

[16] The ALJ found that these statements were not unlawful because Vaivao explained that this information was reported to management by employees. (ALJD at p. 11-12).

Shamrock's position statement to Wallace "interrupting" Beake and leaving the mandatory meeting. (*Id.*). During trial, General Counsel introduced a surreptitious audio recording of the March 31 meeting made by Phipps, which does not appear to capture an interruption by Wallace. (*Id.* at 36:27). Unlike the ALJ, however, Shamrock did not have the benefit of carefully listening to the audio recording as many times as needed. Rather, the position statement was based entirely on witness recollections more than two months after the fact. The ALJ's exaggerated emphasis of this point was erroneous.

The ALJ further relied on Human Resources Vice President Vince Daniels' testimony that he made the decision to discharge Wallace alone, without consulting Beake or anyone else. (*Id.* 41:21-42:21). While General Counsel did not introduce a shred of direct evidence to the contrary, the ALJ dismissed Daniels' testimony as "inherently unbelievable." He based this determination on Daniels' testimony that he typically is not involved in terminations, and on Wallace's testimony that Vaivao purportedly said Shamrock's CEO (Kent McClelland) and Chairman of the Board (Norman McClelland) made the decision to discharge Wallace. (*Id.*)

This finding is based on a selective (and erroneous) recounting of Daniels' testimony. Daniels actually testified that he typically is not "in the bowels of the ship," meaning that he usually does not visit the warehouse. (Tr. 716:20-717:3). He further testified that he "just happened to be there that day and saw" Wallace leave the meeting. (Tr. 717:2-3). Thus, the ALJ's reliance on Daniels' typical lack of involvement in discharges improperly ignored Daniels' testimony as to the reason for his involvement in Wallace's case.

The ALJ similarly erred in regard to Vaivao's purported remark that Norman and Kent McClelland made the decision to discharge Wallace. Notably, Vaivao testified unequivocally that he

never made this statement.[17] But, even setting that fact aside, the General Counsel introduced no evidence to show that Vaivao had personal knowledge of who made the decision to discharge Wallace. Vaivao, in fact, testified without contradiction that he was not involved in the decision and that he had no idea who was. The ALJ therefore erred not only in finding that this comment was made, but also in adopting it as fact.

Perhaps recognizing the tenuous basis for his rejection of Daniels' testimony, the ALJ further found that Daniels' testimony was sufficient to establish an unlawful motive even if true. (ALJD at p. 42:6-21). He based this portion of his opinion on the fact that Daniels did not question Wallace regarding the reason he left the meeting. (*Id.*). But, Daniels explained that he viewed the situation as "cut and dried" and that he did not believe it was necessary to gather additional information or seek advice. (Tr. 721:10-20). While the ALJ may not have agreed with Daniels' view, that fact is irrelevant. As noted above, an employer may discharge [an] employee for any reason, whether or not it is just, as long as it is not for protected activity." *Yuker Constr. Co.*, 335 N.L.R.B. 1072, 1073 (2001) *quoting Manimark Corp. v. NLRB*, 7 F.3d 547, 550 (6th Cir. 1993).

In short, the ALJ's stated reasons for finding a violation in regard to Wallace's termination are unsupported and ignore critical portions of undisputed testimony. His proposed order therefore should be rejected, and the General Counsel's claim based on Wallace's termination should be dismissed.

C. <u>The General Counsel Counsel Cannot Establish That Lerma Was Subject To An Adverse Employment Action (Exception Nos. 147-154)</u>.

Finally, the ALJ erroneously found that Engdahl's May 5 meeting with Lerma was disciplinary in nature, and in retaliation for Lerma's Union activities. As explained in Section V.A,

[17] While the ALJ purported to adopt Wallace's version of events over Vaivao's denial as a credibility determination, he did not base this finding on the demeanor of the witnesses or any other proper factor. Accordingly, this determination is not entitled to the deference typically accorded to ALJ credibility determinations. Moreover, despite dismissing Daniels' testimony as "inherently unbelievable," the ALJ did not apply that same standard to the notion that the CEO and Chairman of the Board of $3 billion company with more than 3,000 employees would be involved in deciding whether to discharge an hourly worker.

supra, a claim of retaliatory discipline requires the General Counsel to establish (among other elements) that the employee was subjected to an adverse employment action. *E.g.*, *Am. Gardens Mgt. Co.*, 338 N.L.R.B. 644, 645 (2002). The General Counsel is unable to make that showing in regard to Lerma.

Engdahl, in fact, testified that this was a "friendly conversation" with "no accusations or anything like that." (Tr. 746:23-747:17). Engdahl further testified that he did his best to make Lerma feel comfortable and to dispel any nervousness. (*Id.*). Ivan Vaivao, Shamrock's Warehouse Manager who also attended the May 5 meeting, testified that this was a "casual conversation" and that Lerma was not being "scolded." (Tr. 245:2-19). The May 5 meeting was not, in any sense, disciplinary.

By definition, a claim of retaliatory discipline requires a showing of discipline. The General Counsel failed to establish that element in regard to its claim on behalf of Lerma. Indeed, even the General Counsel appeared uncertain as to how it wished to characterize this event. On the one hand, the General Counsel claimed that Lerma was actually disciplined. (Compl. ¶ 6(a)). Yet, on the other, the GC alleged that Lerma was only subjected to threats of "unspecified reprisals" during this meeting. (Compl. ¶ 5(w)(1)). In any event, based on Engdahl's testimony, Lerma was neither threatened nor disciplined. The ALJ should have recommended dismissal of both allegations.

VI. THE ALJ'S PROPOSED RELIEF IS NOT APPROPRIATE.

A. No Relief Is Appropriate In This Matter Because Shamrock Did Not Violate The Act (Exceptions Nos. 1, 6, 162, 167).

For the reasons explained above, Shamrock did not violate the Act as alleged in General Counsel's Complaint or in any other manner. The ALJ's findings to the contrary are erroneous. Accordingly, no relief is appropriate in this matter.

B. The ALJ's Recommendation That Either Kent McClelland Or Mark Engdahl Should Read The Proposed Notice Or Be Present For Its Reading Is Improper (Exception No. 165).

Section 10(c) of the Act directs the Board, if it concludes that a party before it engaged in an unfair labor practice, to order the offending party "to cease and desist from such unfair labor practice, and to take such affirmative action … as will effectuate the policies" of the Act. 29 U.S.C. § 160(c). This authority is remedial. *Phelps Dodge Corp. v.* NLRB, 313 U.S. 177, 187 (1941); *see also Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 ("The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes.") "The measure of the Board's remedial power cannot depend solely on the length or frequency of the Employer's conduct: the crucial factor is the effect of that conduct on the employees." *Teamsters Local 115 v. NLRB (Haddon House)*, 640 F.2d 392, 399 (D.C. Cir. 1981).

The requirement that a particular management official read the Board's notice of rights to employees does not effectuate the Act's policies. There is an element of humiliation in requiring that a company official personally and publically read such notice. *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292, 304 (2nd Cir. 1067). The Fifth Circuit denied such relief as "unnecessarily embarrassing and humiliating to management rather than effectuating the policies of the Act." *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869 (5th Cir. 1966).

In this case, the ALJ granted extraordinary relief in the form of requiring either Shamrock's CEO (Kent McClelland) or its Vice President of Operations (Mark Engdahl) to read the notice, or, alternatively, to have one of these individuals present while a Board agent publicly reads the notice to employees. This *ad hominem* attack does not serve the Act's remedial purpose. As discussed above, the ALJ's findings in support of the alleged violations were flawed in multiple respects.

C. The ALJ's Recommended Posting Is Needlessly Redundant (Exception No. 168).

The ALJ's proposed order includes multiple references to the same categories of alleged violations, i.e., "threats of unspecified reprisals." Such repetition is unnecessary.

VII. CONCLUSION

For the reasons explained above, the ALJ's findings concerning alleged violations of Sections 8(a)(1) and (3) of the Act should be rejected and the allegations should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of March, 2016, a true copy of the foregoing was filed electronically with the Executive Secretary. Copies were also sent by electronic mail to:

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